KW KEAT WEI MOTOR SDN BHD v. HCS REALTY SDN BHD & ANOTHER APPEAL

HIGH COURT MALAYA, ALOR SETAR
JOHAN LEE KIEN HOW J
[CIVIL APPEAL NOS: KA-12A-1-02-2025 & KA-12B-5-02-2025]
4 NOVEMBER 2025

Abstract – *(i) An amended originating summons ('OS') that incorporates relevant legal provisions, which were previously omitted and thus constituted a fundamental defect, is subject to the mandatory requirements for amending writs under O. 20 rr. 5 and 7 of the Rules of Court 2012 ('ROC'). Failure to obtain the mandatory leave of court to file such an amended OS, especially when done tactically after the opposing party has filed a striking out application challenging the original OS's legal sufficiency, constitutes a fundamental procedural flaw that is not curable by O. 1A and O. 2 r. 1 of the ROC. Such amended OS is liable to be struck out; (ii) When a termination notice is defective, the landlord's right to terminate does not automatically override a mandatory contractual right of the tenant to renew the tenancy for a further term, conditional upon due notice. In such a case, the tenant's timely notice to extend based on the mandatory renewal clause must be upheld, leading to the renewal of the tenancy agreement.*

CIVIL PROCEDURE: *Pleadings – Originating summons ('OS') – Amendment of OS – Omission of specific legal provisions in intitulement to original OS – Amended OS filed to address legal insufficiency – Amended OS filed without leave – Whether leave of court required – Whether there was fundamental procedural flaw – Whether non-compliance curable – Whether amended OS ought to be struck out – Rules of Court 2012, O. 1A, O. 2. r. 1, O. 20 rr. 5 & 7*

CONTRACT: *Agreement – Tenancy agreement – Termination – Notice of termination – Dispute between landlord and tenant – Tenancy agreement accorded tenant right to mandatory renewal clause – Landlord terminated tenancy agreement – Early termination and non-renewal of tenancy agreement – Whether notice of termination disclosed true reason for termination – Whether notice of termination valid when invoked based on intended sale of premises – Whether landlord's termination right overrode tenant's right to mandatory renewal for additional term*

The respondent, the owner of a property ('premises'), had leased the said premises to the appellant by way of a tenancy agreement. The respondent and the appellant then executed a second tenancy agreement, extending the lease for another three years, *ie,* from February 2022 to February 2025. Under the second tenancy agreement, (i) cl. 3 addressed the appellant's right to renew the tenancy for an additional term, conditional upon the appellant giving the

respondent three months prior notice before the expiry date; and (ii) cl. 5 addressed the respondent's right to terminate the tenancy early if it intended to sell the premises. Dispute arose between the parties when, in September 2023, the respondent informed the appellant that the second tenancy agreement would not be renewed upon its expiration ('non-renewal notice'). The appellant responded that, *inter alia*, it (i) intended to extend the tenancy subject to a new tenancy agreement; and (ii) sought the indulgence of the respondent to consider giving the appellant a first right of refusal/pre-emption to purchase the premises ('notice to extend'). In November 2023, the respondent received an offer from a purchaser who was interested in purchasing the premises. The respondent and the purchaser then entered into a sale and purchase agreement ('SPA'). However, before entering the said SPA, the respondent served the appellant a three months' notice of termination dated 14 November 2023 ('notice of termination'). The notice of termination invoked cl. 5, informed the appellant that the notice period would commence from 1 December 2023 and mandated the appellant to deliver vacant possession by 29 February 2024. The appellant refused to comply with the notice of termination, maintaining that the termination was wrongful and was in breach of the second tenancy agreement; the appellant continued to occupy and operate the premises without authorisation, even after 29 February 2024. This prompted the respondent to claim against the appellant at the High Court. Following the appellant's successful jurisdictional challenge, the claim was moved to the Sessions Court. The respondent then filed a new suit, which included an amended originating summons ('OS') ('amended OS'). The Sessions Court granted the respondent the declaration that the tenancy was terminated on 29 February 2024, ordered vacant possession and awarded double rent from 1 March 2024. Hence, the present appeals by the appellant against the decision of the Sessions Court: (i) on the procedural issue of striking out the amended OS on the ground that it was filed without mandatory court leave; and (ii) challenging the Sessions Court's substantive findings regarding the validity of the termination, the alleged sham SPA, the mandatory renewal clause and the entitlement to double rent.

Held (allowing appeals):

(1a) Order 20 r. 7 of the Rules of Court 2012 ('ROC') explicitly states that 'r. 5 shall have effect in relation to an originating summons as it had effect in relation to a writ'. Therefore, the amendments to writs also applied to originating summonses. Order 20 r. 7 is a mandatory provision where non-compliance to the mandatory provision is not curable by O. 1A and O. 2 r. 1 of the ROC. The respondent's non-compliance with the mandatory provisions of O. 20 rr. 5 and 7 of the ROC was a fundamental procedural flaw that could not be condoned. (paras 37, 48 & 57)

(1b) The appellant had applied to strike out the original OS, highlighting the defective/inaccurate intitulement of the original OS because it omitted specific legal provisions. The respondent filed an amended OS, which involved incorporating the relevant provisions of the law into the intitulement. The amended OS was filed approximately two weeks after the appellant challenged the legal sufficiency of the original OS. The fact that the respondent filed the amendment application to the OS after the appellant had already filed a striking out application was also a point of concern. It suggested that the amendment was a tactical manoeuvre to circumvent the appellant's challenge to the original OS. (paras 39-42)

(1c) The Sessions Court erred in allowing the amended OS without requiring the appellant to obtain leave of the court. The amended OS was struck out. (paras 57 & 58)

(2a) The intention of the contracting parties must be determined objectively and holistically, favouring the interpretation that makes commercial common sense. It made more commercial sense that cls. 3 and 5 placed an obligation on the respondent, as the owner of the premises, to notify the appellant if they wished to dispose of the premises and the option shall be on the appellant whether to surrender vacant possession at the natural expiry of the tenancy or to renew the tenancy to a further term with the owner of the premises. The notice of termination was defective as: (i) the respondent initially failed to disclose the true reason for termination, that was, the intended sale or disposal *via* the SPA, as the respondent only used cl. 5 to justify the action for both the non-renewal agreement and the notice of termination; and (ii) the notice of termination contained a patently erroneous demand date, requiring vacant possession on 29 February 2023, a date that actually predated the issuance of notice of termination dated 14 November 2023. (paras 79, 80, 81 & 84)

(2b) As the notice of termination was defective in law, and the respondent's right under cl. 5 did not automatically override the mandatory renewal under cl. 3, the appellant's refusal to vacate the premises did not constitute a breach of contract. The appellant's timely notice to extend confirmed the appellant's intention to rely on cl. 3, which must be upheld against the respondent's flawed termination attempt. The second tenancy agreement should be renewed for one more term. (paras 92-94)

Case(s) referred to:

Alamgir Abdul Malik v. Zailina Mohd Zainal Harbir [2021] CLJU 2070; [2021] 1 LNS 2070 HC ***(refd)***

Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***

Lembaga Perindustrian Nanas Malaysia v. CCA Advertising Sdn Bhd [2023] CLJU 1905; [2023] 1 LNS 1905 HC ***(refd)***

Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***

MMIP Services Sdn Bhd & Ors v. Mohd Syed Syed Jamaludin & Ors [2023] 8 CLJ 217 CA ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***

Perkayuan OKS No. 2 Sdn Bhd v. Kelantan State Economic Development Corpn [1995] 1 CLJ 761 FC ***(refd)***

Poly Ritz Ventures Sdn Bhd v. Vestland Resources Sdn Bhd [2020] CLJU 1853; [2020] 1 LNS 1853 HC ***(refd)***

SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***

Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331 SC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28(4)(a)
Rules of Court 2012, O. 1A, O. 2 r. 1, O. 20 rr. 1, 3, 5, 7
Specific Relief Act 1950, s. 41

For the appellant - C Charleet & Ch'ng De Sern; M/s De Sern Charleet & Partners
For the respondent - V Amareson; M/s Lim, Wong & Co

[Editor's note: Appeal from Sessions Court; Writ Summon No: KA-A5A-8-09-2024.]

Reported by Najib Tamby

JUDGMENT

Johan Lee Kien How J:

Introduction

[1] A seemingly straightforward commercial tenancy in Guar Cempedak, Kedah, has become the battleground for a high-stake legal dispute as this appeal challenges the very foundation of a landlord's right to terminate a tenancy agreement, questioning whether the respondent's actions have unlawfully deprived the appellant of their rightful occupation of the property.

Brief Facts Of The Case

[2] The respondent owned a specific commercial property with the address of No 2, Ground Floor, Guar Utama Business Complex (or Kompleks Perniagaan Guar Utama), Jalan Guar Utama 1, 08800, Guar Cempedak, Kedah Darul Aman ("the premise").

[3] The relationship between the appellant and the respondent began with the first tenancy agreement dated 29 January 2019 ("the first tenancy agreement"), which leased the premise from the respondent, as the landlord, to the appellant, as the tenant. The first tenancy agreement spanned three years, commencing from 23 February 2019 to 22 February 2022, with a fixed rental rate of RM3,000 per month.

[4] Subsequently, both the appellant and the respondent executed a second term tenancy agreement dated 24 February 2022 ("the second tenancy agreement"), extending the lease for another three years, specifically from 23 February 2022 to 22 February 2025, with the rental rate fixed at RM3,300 per month.

[5] The dispute escalated when the respondent communicated *via* a non-renewal agreement notice (SH2-GF) dated 18 September 2023 ("the non-renewal notice") to the appellant, that the second tenancy agreement would not be renewed upon its expiration on 22 February 2025.

[6] Then, about a month later, on 29 October 2023, the appellant's previous solicitors responded by a letter ("notice to extend") to the notice of non-renewal informing the respondent of the following:

(i) that the appellant has no intention of early termination of the second tenancy agreement;

(ii) that the appellant will go through the full duration of the second term tenancy;

(iii) that the appellant intends to extend the tenancy period of three years subject to a new tenancy agreement; and

(iv) that the appellant seeks the indulgence of the respondent to consider giving the appellant a first right of refusal/pre-emption to purchase the premise.

[7] Later, in or around November, the respondent received an offer from a buyer who was interested in purchasing the premise from the respondent. And pursuant to that offer, the respondent and the buyer entered into a sale and purchase agreement dated 4 January 2024 ("the SPA").

[8] However, before entering into the SPA, the respondent duly served the appellant a three months' notice of termination dated 14 November 2023 ("the notice of termination").

[9] The notice of termination invoked cl. 5 of the second schedule of the second term tenancy ("cl. 5"), informed the appellant that the notice period would commence from 1 December 2023, and mandated the appellant to deliver vacant possession by 29 February 2024, promising to refund deposits upon handover.

[10] The appellant, however, refused to comply with the notice of termination, maintaining that the termination was wrongful and subsequently had breached the second tenancy agreement by continuing to occupy and operate the premise without authorisation after 29 February 2024.

[11] The respondent first initiated legal action *via* originating summons (OS) in the High Court, but following the appellant's successful jurisdictional challenge on 4 September 2024, the claims were correctly moved to the Sessions Court.

[12] The respondent then filed a new suit (OS No: KA-A54-8- 09/2024) ("Suit A54"), which eventually included an amended originating summons ("the amended OS") (encl. 8). The learned Sessions Court Judge ("LSJ") ultimately delivered a decision on 3 February 2025, granting the respondent the declaration that the tenancy was terminated on 29 February 2024, ordering vacant possession, and awarding double rent (RM6,600 per month) from 1 March 2024.

[13] Hence, there are two separate appeals filed by the appellant challenging the order and judgment in Suit A54:

(i) appeal no: KA-12A-1-02/2025 ("Appeal 12A") relates to the procedural issue of striking out the amended OS, on the ground that it was filed without mandatory court leave; and

(ii) appeal no: KA-12B-5-02/2025 ("Appeal 12B") challenges the Sessions Court's substantive findings regarding the validity of the termination, the alleged sham SPA, the mandatory renewal clause, and the entitlement to double rent.

[14] Both Appeal 12A and Appeal 12B were heard together pursuant to an order obtained by the appellant on 20 July 2025. In view of that, this court now provides a consolidated judgment for both appeals.

The Appellant's Submission

Appeal 12A

[15] The appellant has highlighted several issues pertaining to the amended OS. The appellant submits that the amended OS should be struck out on two grounds:

(i) no leave was obtained. The appellant firmly argues that the respondent should have obtained leave of court under O. 20 r. 5 of the Rules of Court 2012 ("the ROC"); and

(ii) the amended OS is *mala fide*.

Appeal 12B

[16] For Appeal 12B, specifically, the appellant argues that the LSJ has failed to properly consider the established principles of contractual interpretation, particularly regarding the objective intention of the parties

and the need to construe the agreement as a whole as stated in *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2017] 2 MLJ 819.

[17] The appellant contends that the LSJ failed to give due weight to the mandatory nature of cl. 3, emphasising that the use of 'shall' imposes a binding obligation on the respondent to grant the renewal, absent any breach of the agreement by the appellant. Furthermore, the Sessions Court did not account for the fact that the appellant had expressed their intention to renew the tenancy by way of notice to extend.

[18] The appellant further submits that cl. 5 should be interpreted in a manner that is consistent with the rest of the second term tenancy, particularly cl. 3, to prevent cl. 5 from negating the appellant's right to renew. To that end, the reliance on cl. 5 by the respondent is an erroneous interpretation, as the intention of the parties has been consistent that the landlord has no right to prematurely terminate the tenancy.

[19] Drawing from the principles outlined in *Perkayuan OKS No 2 Sdn Bhd v. Kelantan State Economic Development Corpn* [1995] 1 CLJ 761, the appellant argues that the notice of termination was deficient because it lacked specific details regarding the intended disposal, such as the identity of the prospective purchaser or the specific terms of the sale. The notice of termination was vague and did not provide sufficient information for the appellant to understand the basis for the termination.

[20] The appellant asserts that the SPA lacks genuineness, pointing to inconsistencies such as the certificate of completion and compliance (Borang F) not being addressed to the respondent and the failure to provide evidence of payment of the purchase price. The appellant also highlights the fact that the respondent did not act against the buyer for failing to complete the sale, further suggesting that the SPA was not a *bona fide* transaction.

[21] Finally, given the complex factual matrix and the need for witness testimony to resolve the disputes surrounding the interpretation of the agreement, the validity of the notice of termination, and the genuineness of the SPA, the appellant argues that the LSJ erred in proceeding *via* originating summons, which is ill-suited to resolving such substantial factual disputes.

[22] The appellant refers to the case of *Ting Ling Kiew & Anor v. Tang Eng Iron Works Co Ltd* [1992] 3 CLJ 1685; [1992] 1 CLJ (Rep) 331; [1992] 2 MLJ 217, emphasising that proceedings involving significant factual disputes, especially those involving allegations of fraud or misrepresentation, should be commenced by writ to allow for proper examination and cross-examination of witnesses.

A **The Respondent's Reply**

Appeal 12A

[23] It is the respondent's contention under Appeal 12A that the amended OS sought by the respondent do not fall within the ambit of O. 20 r. 5 of
B the ROC, as the amendments neither involve correcting the name of parties, altering the capacity in which a party sues, nor adding or substituting a new cause of action. The addition of provisions of law merely formalises and clarifies the legal basis for the reliefs sought and does not introduce any new or unexpected element to the pleadings.

C **[24]** The respondent's position is further supported by the provisions of O. 20 r. 3 of the ROC, which allow amendments to be made without leave at any time before the close of pleadings. Order 20 r. 3 of the ROC is designed to permit parties to make procedural or clarificatory amendments to ensure that the pleadings accurately reflect the issues in dispute. The
D addition of provisions of law to the intitulement is a procedural step that merely clarifies the legal basis of the respondent's claim and does not prejudice the appellant. Such amendments are routine in nature and do not affect the substantive rights of the parties.

[25] The respondent further argued that the appellant, cannot seek to set
E aside the amended OS through the present application in encl. 11 for the proper recourse of the appellant; if aggrieved by the amended OS, is to appeal to the High Court.

[26] Learned counsel for the respondent asserts that allowing the appellant to challenge the amended OS at this stage would undermine the finality of
F the court's endorsement and disrupt the procedural integrity of the case and thus, the principle of *functus officio* precludes the court from revisiting its decision to accept the amended pleadings, and the appellant's remedy lies in an appeal, not a collateral application.

G *Appeal 12B*

[27] Concerning Appeal 12B, the respondent submits that the second tenancy agreement is valid and binding, as all essential elements of a contract are satisfied. The appellant, by signing the second tenancy agreement, unequivocally agreed to abide by all its terms and conditions. The
H respondent has acted in good faith and in accordance with the terms set out in the second tenancy agreement. The respondent cited cases like *Lembaga Perindustrian Nanas Malaysia v. CCA Advertising Sdn Bhd* [2023] CLJU 1905; [2023] 1 LNS 1905; [2023] MLRHU 1575 and *Poly Ritz Ventures Sdn Bhd v. Vestland Resources Sdn Bhd* [2020] CLJU 1853; [2020] 1 LNS 1853;
I [2020] MLRHU 1639 to support its contention.

[28] The respondent submits that cl. 3 does not grant the appellant an absolute or unilateral right to renew the tenancy as the renewal is conditional upon compliance with specific requirements, including providing three months' prior written notice, not being in breach of any covenants, and the absence of a prior intention to terminate.

[29] The respondent further premises that the word "shall" must be interpreted in the context of the entire agreement, and the appellant's failure to satisfy these conditions negates any obligation on the part of the respondent to renew the tenancy.

[30] Furthermore, the respondent emphasises that the first schedule of the second tenancy agreement expressly stipulates '*nil*' in the column pertaining to renewal. This indicates, without ambiguity, that no option for renewal was ever agreed upon or intended by the parties at the time the agreement was executed. The inclusion of '*nil*' demonstrates a clear and intentional decision by both parties not to include a renewal option in the second agreement.

[31] The respondent further argues that cl. 5 explicitly anticipates terminating the tenancy prior to its natural expiration date, contingent on the respondent's intention to dispose of the premise. The term "dispose" is commonly understood to include a sale or transfer of ownership. The clause outlines clear procedural requirements for the respondent to exercise this right, including providing the tenant with three months' advance notice and refunding the deposit and utility deposit.

[32] The plain wording of cl. 5 unambiguously grants the respondent the right to terminate the tenancy if the premise is to be disposed of, provided the specified conditions are satisfied.

[33] In reply to the allegation that the SPA is a sham, the respondent alleges that the appellant is bound by the terms of the second tenancy agreement, and the respondent has expressed a *bona fide* intention to sell the premise, falling squarely within the ambit of cl. 5. The respondent has complied with the procedural requirements of cl. 5 by issuing the requisite three months' notice to the appellant and offering to refund the deposits.

Decision, Findings And Evaluations Of The Court

[34] Based on my appraisal of the evidence and affidavits put forward by all parties, and after careful consideration of the learned counsels' submissions and the grounds prepared by the LSJ, I am led to a different view than that of the LSJ. This court finds that the respondent's amended OS should be struck out and the termination of the second tenancy agreement is invalid.

[35] The judgment in favour of the appellant is supported by the manifest defects in the respondent's notice process and the necessary contractual interpretation favouring the appellant's mandatory right to renew. Herein are my reasons.

Appeal 12A

[36] The core issue in Appeal 12A is concerning the validity of the amended OS in encl. 8, as the appellant argues that the respondent failed to obtain leave from the court before making the amendments, which is a critical procedural flaw.

[37] This court agrees with the appellant's interpretation of the Rules of Court 2012. As highlighted in the appellant's submission, O. 20 r. 7 of the ROC explicitly states that "r. 5 shall have effect in relation to an originating summons as it has effect in relation to a writ". This indicates that the provisions governing amendments to writs also apply to originating summonses.

[38] The respondent, in their submission, attempts to argue that the amendments were merely procedural and fell within the ambit of O. 20 r. 1 of the ROC, which allows for certain amendments without leave. However, this argument overlooks the specific requirements outlined in O. 20 r. 5 of the ROC, which governs situations where amendments involve correcting the name of parties, altering the capacity in which a party sues, or adding/substituting a new cause of action.

[39] The respondent alleges that the appellant suffered no prejudice because the appellant was fully aware of the reliefs sought in the original OS and supporting affidavit, even without the specific provisions listed in the intitulement. The respondent contends that prejudice must amount to a material impairment of the ability to defend the case, which did not occur here. After all, it is undisputed that the appellant filed an application in encl. 6, seeking to strike out the original originating summons. This application highlighted the defective/inaccurate intitulement of the original OS because it omitted specific legal provisions, such as s. 41 of the Specific Relief Act 1950 and s. 28(4)(a) of the Civil Law Act 1956. This strike-out application was filed on 4 November 2024.

[40] The respondent subsequently filed the amended OS (encl. 8) on 19 November 2024, which involved incorporating the relevant provisions of the law into the intitulement.

[41] Therefore, the amended OS was filed approximately two weeks after the appellant challenged the legal sufficiency of the original OS.

[42] To this court, the fact that the respondent filed the amendment application to the OS after the appellant had already filed a strike-out application is also a point of concern. It suggests that the amendment is a tactical manoeuvre to circumvent the appellant's challenge to the original OS.

[43] As the appellant rightly argues, strict compliance with the intitulement rule is required. The failure to expressly state the specific legal provision under which relief is sought in the originating summons is a significant defect. To further, it is to be noted that the case is a hybrid of numerous legal remedies. Hence, without clearly specifying the correct and details of the laws the OS was filed under, would cause injustice to the appellant.

[44] It is trite law that strict compliance with the intitulement rule is required as highlighted by the Court of Appeal case of *MMIP Services Sdn Bhd & Ors v. Mohd Syed Syed Jamaludin & Ors* [2023] 8 CLJ 217:

> [28] *On the issue of the intitulement, it is trite that every originating summons shall state in its intitulement any provision of the rules and any provision of any written law under which the Court is being moved as stated under Order 7 r. 2(1A) of the Rules of Court 2012 (ROC). It is mandatory in nature by the use of the word 'shall' in the said provision.*
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> In *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, this court through the decision of Gopal Sri Ram JCA (as he then was) had this to say at page 477:
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> > The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support, one would come to the conclusion that it is not an application made under O. 89. *The summons does not, as I observed very early in this judgment, state any particular rule of court in its intitulement, Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which rule of court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the court. It would make a mockery of the principle that there must be no surprise in civil litigation*. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not. In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the court by surprise. It is my opinion that an *originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise, it would be an embarrassing pleading and be may be liable to be struck out, unless sooner amended*. See also our decisions in *Uthayakumar a/l Ponnusamy v. YAB Dato' Sri Najib bin Tun Razak Perdana Menteri Malaysia & Ors* [2017] 1 MLJ 235 and *Ketua Pengarah Imigresen Malaysia lwn. Heng Peo* [2007] 3 MLJ 97.
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> (emphasis added)

[45] In the present appeal, the respondent has in their originating summons (encl. 1) omitted the specific provisions under which their reliefs are sought, namely s. 41 of the Specific Relief Act 1950 for a court declaration and s. 28(4)(a) of the Civil Law Act 1956 to seek double rent for holding over. It is evident that the specific legal provision under which relief is sought must be expressly stated in the originating summons. Failing which may render the originating summons liable to be struck out unless amended. Hence, the omission of the specific provision in the intitulement is not merely a technical irregularity.

[46] It is apt to note that this issue of the defective/inaccurate intitulement was raised by the appellant in their affidavit in support of their striking out application (encl. 6, dated 4 November 2024). The respondent, only two weeks later, filed the amended originating summons (encl. 8) on 19 November 2024 without seeking the Sessions Court's leave.

[47] This court, therefore, agrees with the appellant's submission that O. 20 r. 7 of the ROC is a mandatory provision whereby non-compliance to the mandatory provision is not curable by section O. 1A and O. 2 r. 1 of the ROC.

[48] The timing of the respondent's amendment, occurring subsequent to and in response to the appellant's strike-out application (encl. 6), strongly suggests an attempt to defeat the application rather than a good faith correction. As held by the court in *Alamgir Abdul Malik v. Zailina Mohd Zainal Harbir* [2021] CLJU 2070; [2021] 1 LNS 2070:

> [30] In my judgment, *the Plaintiff's application for the proposed amendments was calculated to overreach the Defendant's application to strike out the Originating Summons and to render it inconsequential*.
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> [32] I agree with submission of counsel for the Defendant that, in the circumstances, *the Plaintiff's application for the proposed amendment is a tactical manoeuvre*. See: *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; and *Tetuan Tanjung Teras Sdn Bhd & Ors v Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 4 MLJ 465; [2003] 7 CLJ 124.
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> [33] For the reasons I have given, *I am not persuaded that the Plaintiff's application in respect of the proposed amendments is bona fide. The Plaintiff has also failed to satisfy the Court that the proposed amendments will cause no prejudice to the Defendant which cannot be compensated by costs* and that they are not such as to turn the suit of one character into a suit of another and inconsistent character.
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> (emphasis added)

[49] Therefore, based on the non-compliant filing and the chronology of events, it is evident that the respondent ought to have filed an application to seek the court's leave to amend the original originating summons but chose instead to amend and file it to overreach the appellant's application and render it inconsequential.

[50] Therefore, the respondent's failure to obtain leave to amend the originating summons is not a mere technicality but it is a substantive procedural flaw that renders the amended OS invalid.

[51] By failing to comply with the ROC, the respondent has not only prejudiced the appellant but has also undermined the integrity of the judicial process.

[52] During oral submissions, learned counsel for the appellant astutely pointed out a critical concession: the respondent, in its written submission (encl. 36) had explicitly acknowledged the applicability of O. 20 r. 5 of the ROC to amendments involving the intitulement, directly contradicting their later stance that no leave was required.

[53] Under rigorous questioning from this court regarding the core requirements of O. 20 r. 5 of the ROC, the respondent's counsel conceded that the only permissible avenue for amending the original OS was, in fact, to obtain prior leave from the court. This is indeed a damaging admission given that the respondent has failed to do so.

[54] The court has carefully considered the submissions of learned counsel for the respondent regarding the doctrine of *functus officio* and the assertion that the appellant's remedy must lie exclusively in an appeal against the endorsement of the amended OS.

[55] It is the judgment of this court that the respondent's submission on the applicability of *functus officio* in this context is misconceived, and the appellant's challenge by way of application to disallow the amended OS was the correct and prescribed legal avenue.

[56] While appellate courts are generally hesitant to interfere with the decisions of trial judges, intervention is warranted in this case because the LSJ's decision to allow the amendment without leave was plainly wrong.

[57] For the reasons outlined above, I find that the LSJ has erred in allowing the amended OS without requiring them to obtain leave of the court. The respondent's non-compliance with the mandatory provisions of O. 20 rr. 5 and 7 of the ROC 2012 is a fundamental procedural flaw that cannot be condoned.

[58] Therefore, I decide in favour of the appellant and allow the appeal with costs, ordering that the amended OS in encl. 8 be struck out. Even if I am wrong in this decision concerning Appeal 12A, the following discussion about Appeal 12B will inevitably arrive at the same conclusion: that the appeal be allowed and the decision of the LSJ be set aside.

Appeal 12B

[59] The appellant raises the issue whether the LSJ has erred in disregarding the right of appellant to renew the tenancy under cl. 3, which reads as follows:

> Subject to the giving of three (3) months prior written notice to the Landlord before the expiry date and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Tenant herein contained, the Landlord shall, at the costs and expenses of the Tenant, renew the Tenancy for another Three (3) years and the rental shall be increased at the rate not exceeding Ten percent (10%). The Rental Security Deposit and the Utility Deposit shall be adjusted accordingly to be equivalent to three (3) months of the increased rent.

[60] The appellant argues that the right to renew for a further period of three years (until 2028) is mandatory, relying on these points:

(i) the word "shall" in cl. 3 imposes a mandatory obligation on the respondent to extend the tenure of the tenancy, subject only to the required conditions being met; and

(ii) the appellant had fulfilled the requirement for renewal by providing notice of their intention to extend the tenancy through a letter dated 29 October 2023. This notice was issued at the very first opportunity after the respondent issued its initial non-renewal agreement.

[61] In reply, the respondent contents that the first schedule to the second tenancy agreement expressly states "option to renew: *nil*". This entry is unequivocal and reflects the mutual and deliberate intention of the parties that no contractual right of renewal was agreed upon. The first schedule, being the commercial summary, should prevailed.

[62] The respondent further contrasts the second tenancy agreement with the first tenancy agreement, which had an express renewal clause. The omission of such a clause in the second tenancy agreement, marked by the entry "*nil*", signifies a conscious decision by both parties not to provide for any further renewal.

[63] The respondent also argues that even if cl. 3 is accepted, the obligation to renew is contingent upon the tenant not being in breach of any covenants at the time of the request. It was the respondent's argument that the appellant had failed this key precondition because they allegedly carried out unauthorised alterations and installations, specifically including the fixing of air-conditioning units, without the respondent's prior written consent. This material breach negates any obligation for the respondent to renew the tenancy.

[64] The primary conflict, therefore, lies between the standard schedule entry, '*nil*', and the detailed operational term of cl. 3, using 'shall'. A

[65] The court is of the view that the specific, mandatory obligation outlined in cl. 3, "the landlord shall ... renew the tenancy for another three years", reflects a high degree of negotiated intent, in contrast to the entry "*nil*" in the summary schedule which creates an ambiguity. B

[66] Under the principle of *contra proferentem*, where a contract contains conflicting or ambiguous terms, the ambiguity must be construed against the party who drafted the document (see *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 and *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731). C

[67] This rule ensures that the respondent, who was responsible for the drafting and inclusion of both contradictory terms in the second tenancy agreement, cannot rely on the ambiguity to defeat the tenant's contractual right. By resolving the conflict against the landlord, the clear, mandatory language of cl. 3 is given effect. D

[68] The respondent relies heavily on the alleged breach (unauthorised alterations/installations) to argue that the precondition for cl. 3 was not met. It is to be noted that the fundamental argument for termination initially rested on the non-renewal agreement and the subsequent disposal of the premise in cl. 5. E

[69] Relying on a specific technical breach (unauthorised air-conditioners) only after the tenant asserts its right to mandatory renewal, to this court, suggests that the allegation of breach is a pretext being deployed retrospectively to avoid a contractual obligation, rather than a genuine or material concern that prompted the termination in the first place. F

[70] If the breach was material, the respondent would have relied on it initially to deny the renewal right. Crucially, the respondent did not produce any proof as to the alleged breach, neither has the breach been notified prior to that. G

[71] Given that cl. 3 constitutes a specific, detailed covenant setting forth the conditions for renewal, this court determines that this negotiated term must prevail over the generalised, contradictory entry of '*nil*' in the first schedule, thereby resolving the contractual ambiguity in favour of the appellant. H

[72] Now, the court will address the core conflict in the second tenancy agreement, that is, whether cl. 5 grants the respondent an absolute, unilateral right to terminate the tenancy prematurely upon the desire to sell, or if it serves a more restrictive purpose related to the overall contractual structure. Clause 5 reads as follows: I

> The parties herein agree that should the Landlord wishes to dispose of the Demised premises before the expiry of this Tenancy, the Landlord shall give to the Tenant a three (3) months' notice in advance and to refund the Deposit and the Utility Deposit to the Tenant provided always that the vacant possession of the Demised premises shall be delivered to the Landlord in its original state and condition.

[73] The respondent avers that cl. 5 reflects the true intention of the parties to allow for early termination if the landlord decides to dispose of the premise before the tenancy's expiry.

[74] The respondent argues that the language of cl. 5 is unambiguous and must be interpreted according to its plain and ordinary meaning. The clause explicitly anticipates "terminating the tenancy prior to its natural expiration date" contingent upon the respondent's intention to dispose of the premise. Furthermore, the clause begins, "The parties herein agree ...", signifying the mutual acceptance and binding nature of this term.

[75] During the oral submission, it was agreed by both parties that the second tenancy agreement was set to expire on 22 February 2025. The appellant's right to renew the tenancy for a further three years until 2028 was conditional upon giving three months prior written notice before the expiry date.

[76] This meant that the last date for the appellant's renewal notice was 22 November 2024 (*ie*, three months prior to expiry). However, the respondent acted early by issuing the non-renewable agreement dated 18 September 2023, unilaterally informing the appellant that the tenancy "will not be renewed".

[77] It is undisputed that the appellant promptly replied by its notice to extend dated 29 October 2023, expressing the intention to extend the tenancy period for three years. This assertion of the renewal right was then met by the respondent's premature notice of termination dated 14 November 2023, which invoked cl. 5 to demand vacant possession by 29 February 2023.

[78] Contrasting the respondent's assertion that the termination was valid under cl. 5, the appellant has consistently maintained that cl. 5 confers no right upon the respondent to prematurely terminate the second tenancy agreement.

[79] To answer this, the intention of the contracting parties must be determined objectively and holistically, favouring the interpretation that makes commercial common sense, as articulated by Zainun Ali FCJ in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464:

> [78] Thus the nub of this appeal is, *when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear*. It is noteworthy that the

same approach was taken by Lord Hodge (in the majority decision of *Arnold v. Britton*), where His Lordship accepted the unitary process of construction in *Rainy Sky SA v. Kookmin Bank* [2011] 1 WLR 2900 para 21 that:

> *... if there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*
>
> (emphasis added)

[80] By applying the principle in the abovementioned case, it makes more commercial sense that cl. 3 and cl. 5 place an obligation on the respondent as the owner of the premise to notify the appellant if they wish to dispose the premise, and the option shall be on the appellant whether to surrender vacant possession at the natural expiry of the tenancy, or to renew the tenancy to a further term with the new owner of the premise.

[81] Above all, the court is of the view that the notice of termination is defective on multiple grounds. Firstly, the appellant correctly highlights that the respondent initially failed to disclose the true reason for termination, that was, the intended sale or disposal *via* the SPA, as the respondent only used cl. 5 to justify the action in both the non-renewal agreement and notice of termination.

[82] This vague communication lacks the necessary factual particulars regarding the respondent's wish to dispose of the premise. As envisaged in *Perkayuan OKS* (*supra*), a notice that merely parrots the language of clause, and fails to provide any facts or particulars, is clearly insufficient and inadequate, and amounts to no notice.

[83] Similar to our appeal herein, the notice of termination lacks details as to the identity of the third party, and the failure to give any facts or particulars, nor reason as to the termination. Hence, such a vague notice is no notice.

[84] Secondly, the notice of termination contained a patently erroneous demand date, requiring vacant possession on 29 February 2023, a date that actually predated the issuance of the notice of termination dated 14 November 2023, confirming the notice was poorly communicated and legally unsound.

[85] The objective test, established in cases like *SPM Membrane* (*supra*), requires clear communication, and hence I find that by merely stating cl. 5 without detailing the intention to dispose the premise and the confusing and bad communication making the notice ineffective.

[86] The respondent's actions, in issuing a vague and premature notice of termination, raise serious concerns about its good faith and equitable conduct. The respondent's failure to be transparent about their reasons for termination, coupled with the patently erroneous demand date, suggests an attempt to mislead or obfuscate the true nature of their intentions.

[87] The court finds that the respondent's actions, particularly the issuance of a defective and misleading notice of termination, and their subsequent inconsistent reliance on contractual principles, demonstrate a lack of good faith and equitable conduct.

[88] Applying the principle from *SPM Membrane* (*supra*), the two clauses must be read holistically such that the meaning and purpose of one clause are "not lost or rendered nugatory by operation of the other". It is commercially unsound to assume that cl. 5, which deals with disposal, overrides the mandatory renewal right granted by cl. 3, thereby allowing the respondent as the landlord to escape a clear obligation merely by contemplating a sale.

[89] The more commercially sensible interpretation, as submitted by the appellant, is that cl. 5 was introduced specifically to protect the tenant's interest by obligating the landlord to provide notice of disposal. This notice triggers an option for the appellant either to deliver vacant possession (and receive a deposit refund) or to enforce its mandatory right to renew under cl. 3 with the new purchaser.

[90] This interpretation is strongly supported by cl. 16 of the second tenancy agreement, which dictates that the agreement "shall be binding upon the ... successor-in-title". This binding effect means that even if the SPA were genuine, the purchaser would inherit the obligation to respect the appellant's right to occupy the premise until the natural expiry on 22 February 2025 and honour the mandatory renewal right under cl. 3, that is until 2028.

[91] I fully concur with the appellant that the tenancy, therefore, is essentially non-terminable prematurely by virtue of cl. 5.

[92] As the notice of termination was defective in law, and the respondent's right under cl. 5 does not automatically override the mandatory renewal under cl. 3, the appellant's refusal to vacate the premise did not constitute a breach of contract.

[93] The appellant's timely notice to extend confirms the appellant's intention to rely on cl. 3, which must be upheld against the respondent's flawed termination attempt.

[94] Crucially, this court agrees with the appellant that the respondent had attempted to notify the appellant of its intention not to renew the tenancy through the notice dated 18 September 2023. Only upon resistance of the appellant with reasons (as granted by the tenancy), the respondent attempted (through its notice of termination dated 14 November 2023) to quote cl. 5 as its reason to terminate the tenancy. The fact that the respondent took no action against the buyer for failure to complete the sale further demonstrates a lack of equitable conduct and a failure to act in good faith, and this weighs heavily against the respondent.

Conclusion

[95] For the foregoing reasons, this court disagrees with the LSJ, and this court finds the decisions of the LSJ are plainly wrong due to errors in contractual interpretation and failure to uphold mandatory procedural rules.

[96] The second tenancy agreement should be renewed for one more term, as the notice of termination dated 14 November 2023 is invalid and bad in law for failing to clearly express the intention to dispose of the premise and this invalidity necessitates upholding the appellant's mandatory renewal right under cl. 3.

[97] The injunction sought by the respondent in encl. 11, which relates to the procedurally unsound amended OS (encl. 8) filed without mandatory leave, is to be set aside as it is no more relevant and become academic.

[98] And hence, both of the appellant's appeals (Appeal No: KA-12A-1-02/2025 and Appeal No: KA-12B-5-02/2025) are allowed with cost of RM10,000 to be paid by the respondent to the appellant.